IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

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No. 77-1822

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State of Indiana, Petitioner

vs.

Hugh Martin, Respondent

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ON A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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MEMORANDUM FOR RESPONDENT, HUGH
MARTIN, IN OPPOSITION TO THE GRANTING
OF THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

John R. Obenchain
Counsel for Respondent
1800 American National Bank
Building
South Bend, Indiana 46601
Telephone: (219) 233-1194

The State of Indiana in its petition to this Court for a Writ of Certiorari states that this Court has jurisdiction based on their allegation that the Seventh Circuit decided a Federal question in a way in conflict with this Court's ruling in Neil v. Biggers, 409 U.S. 188 (1972).

The State concedes that the pretrial lineup was unnecessarily suggestive as found by the District Court and affirmed by the Seventh Circuit. The State then asserts that it carried its burden of showing, by clear and convincing evidence, that the in-court identifications were reliable, despite its suggestive pretrial lineup, by relying entirely upon the trial record and chose to adduce no additional testimony at the District Court habeas

corpus hearing. The State's sole contention, as shown on pages 6 and 7 of its petition, is that based on the factors set forth by this Court in Neil v. Biggers, supra, the Seventh Circuit's holding that the State did not carry the burden of proof by clear and convincing evidence, that the in-court identification was reliable despite a suggestive pretrial lineup, was clearly erroneous; and, therefore, was in conflict with this Court's decision in Neil v. Biggers, supra.

We submit to the Court that when the facts of this matter are examined and compared with the factual situation present in Neil v. Biggers, supra, it can be seen that the facts are readily distinguishable. This Court in Neil v. Biggers, supra, held that the consideration of the respondent's due process claim turned upon the facts of the crime and of the identification. When the facts of this matter are considered in light of the factors set forth by this Court in Neil v. Biggers, supra, it can be seen that the lower Federal Courts were justified in finding that the State failed to sustain its burden of showing by clear and convincing evidence that the in-court identification was reliable despite the suggestive pretrial lineup.

Since a factual determination is involved, the factors set out by this Court in Neil v. Biggers, supra, are listed below, together with a comparison of the relevent evidence in this matter and in Neil v. Biggers, supra.

1. Opportunity of the witness to view the criminal at the time of the crime.

A. Martin: The robbery took from ten to twenty minutes [Tr.p.215], and a large portion of the time was consumed in the scuffle in which Mr. Davis was dragged into a restroom and shot. [Tr.p.197] There were two (2) assailants involved and there is no evidence in the record as to exactly how good an opportunity Mr. Davis had to observe either or both of his assailants or just when the shooting occurred during the course of the robbery. Also, the record is not totally clear as to just how well-lighted the area was.

B. Neil v. Biggers: The crime involved was rape, one of the most personally humuliating of all crimes, a crime in which the victim and the assailant must necessarily come into close physical contact. The victim spent up to one-half hour with her assailant under adequate artificial light and under a full moon, and at least twice faced him directly and intimately. The victim testified at the habeas corpus hearing that there was something about his face that she could never forget.

2. The accuracy of the witness' prior description.

A. Martin: Robert J. Davis, the victim, stated that the man who shot him was a "dark-skinned negro", [Tr.p.205] who was the shorter of the two involved in the robbery [Tr.p.197], but the testimony and the evidence at the trial revealed that Hugh Martin was the taller [Tr.p.270] and the lighter [Tr.p.328] of the two. The Trial Court took judicial notice of the fact that Hugh Martin is at least an inch and one-half or two inches taller than the accomplice [Tr.p.270].

B. Neil v. Biggers: The victim's description to the police included the assailant's approximate age, height, weight, complexion, skin texture, build and voice, and the Court found that it was more than ordinarily thorough. The victim testified that she had "no doubt" that the respondent was the person who raped her. The victim's description closely fit the actual description of the respondent.

3. The witness' degree of attention.

A. Martin: The victim's attention was necessarily divided among two (2) assailants and a large portion of the time was consumed in a scuffle in which the victim was dragged into a restroom and shot. [Tr.p.197] There is no evidence as to exactly how good an opportunity the victim had to observe either or both his assailants or exactly when during the course of the robbery the shooting took place.

B. Neil v. Biggers: The victim was no casual observer, but rather the victim of one of the most personally humiliating of all crimes, which involves close face-to-face physical contact.

4. Level of certainty demonstrated by the witness at the confrontation.

A. Martin: As the District Court stated in its memorandum opinion dated September 23, 1977, the level of certainty at the confrontation is highly suspect given the composition of the lineup. The District Court in that opinion found that any certainty of identification at the lineup was caused by the suggestiveness of the lineup itself. The following facts are pertinent concerning the conduct of the lineup:

(a) Twelve (12) people were involved in the lineup [Tr.p.208];

(b) Of the twelve (12), ten (10) were caucasian [Tr.p.302];

(c) Of the ten (10) caucasians, two (2) were women [Tr.p.214];

(d) The only other negro was eighteen (18) years old [Tr.p.302] and five feet three inches (5'3") tall [Tr.p.302];

(e) Hugh Martin was the only one who was requested to step forward [Tr.IIp.9];

(f) Hugh Martin was the only one who was requested to speak [Tr.IIp.9];

(g) Hugh Martin was the only one who was requested to state his name, address, where he worked, and what he was in the lineup for [Tr.IIp.9];

(h) Davis was told by detectives to come down to the lineup to identify the guy that shot him [Tr.p.220];

(i) When Davis went down to the lineup, he was only interested in the man who shot him and he was looking for a man named "Martin" [Tr.p.222];

(j) Davis had heard the name of Hugh Martin being the name of the man who shot him prior to the lineup [Tr.p.226];

(k) Davis' identification was made certain by Martin's presence in the lineup. There was no question about that. [Tr.p.224];

(l) Hugh Martin was the only one wearing prison-type garb [Tr.p.201].

Despite the fact of the suggestiveness of the pretrial lineup, Mr. Davis did not immediately identify Martin at the lineup [Tr.p.216]. Mr. Davis, on the day following the robbery, was shown a group of fifteen (15) to twenty (20) pictures by the police and he picked out several people from the mug shots that looked like the man who shot him. [Tr.p.227] The State, at the habeas corpus hearing, adduced no testimony regarding the certainty of identification at the time of the crime.

B. Neil v. Biggers: The victim testified that she had "no doubt" about her identification. At the habeas corpus hearing, she elaborated in response to questioning that she had no doubt that when she first laid eyes on him she knew it was the individual, because there was just something about his face that she could never forget. The victim had also viewed several suspects at the police station, some in lineups and some in showups, and was shown between thirty (30) and forty (40) photographs, prior to the show-up in question, and she identified none of the suspects prior to identifying Mr. Biggers.

5. Length of time between the crime and the confrontation.

A. Martin: The identification was made at least four (4) months after the commission of the crime.

B. Neil v. Biggers: The identification was made seven (7) months after the commission of the crime. However, this Court stated that a lapse of seven (7) months would be a seriously negative factor in most cases. There, however, the testimony was undisputed that the victim made no previous identification at any of the showups, lineups or photographic showings.

## CONCLUSION

The facts of the present case are clearly distinguishable from those present in Neil v. Biggers, supra. When the facts of this matter are applied to the factors set forth by this Court in Neil v. Biggers, supra, it is shown that there is substantial evidence in the record to support the lower court's finding that the State did not carry its burden of proving by clear and convincing evidence that the in-court identification was reliable despite the suggestive pretrial lineup. Thus, the asserted conflict between Neil v. Biggers, supra, and the decision below, necessary for this Court to assert jurisdiction, does not exist.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

John R. Obenchain
1800 American National Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1194
Attorney for Respondent